DAC6
Mandatory disclosure of cross-border arrangements

What is DAC6?

The recent EU Council Directive 2018/822 introduces a requirement for EU tax intermediaries and advisers to provide tax authorities with details of certain international tax planning arrangements specific to clients.

There are no de-minimis limits and yet penalties for failures can be significant (local country penalties can be several million Euros). Under the Directive, reporting starts after July 2020 (subject to up to 6 months deferral due to Covid-19, where locally implemented) for arrangements dating from 25 June 2018. Brexit has no effect on this; the UK implemented The International Tax Enforcement (Disclosable Arrangements) Regulations 2020.

What are my obligations?

The reporting obligation primarily falls on a taxpayer's "intermediaries" – advisers who assisted with the planning. In some circumstances the reporting obligation falls on the taxpayer. However, there are good reasons why a taxpayer will choose to be actively involved:

Taxpayers must include in their tax return details of any reports made about them. Larger taxpayers are obliged to have policies to manage tax risks including those reported as tax planning.

Penalties for failure to report can be mitigated where there are proper internal procedures. DAC6 compliance is part of overall tax risk management which can impact on risk ratings by tax authorities.

Reporting deadlines are short; under the Directive, intermediaries have 30 days to report arrangements from 1 July 2020. This is now subject to an optional deferral of up to 6 months, where locally implemented, due to Covid-19. The UK will implement the maximum deferral of 6 months (i.e. 1 Jan 2021).

Coordination is required to avoid inconsistencies in reporting which could trigger tax audits, and to ensure reports meet different local reporting standards across Europe. Failure to facilitate the sharing of Arrangement Reference Numbers (ARNs) may result in duplicate reports and create penalty exposures.

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Hallmarks – Main benefit test

This test is met if the main benefit, or one of the main benefits which…a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage. This an objective test – not a test of motives.

Main benefit test required – Hallmarks A to C

Confidential advice
Contingent fees
Standard documentation

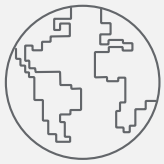
Tax benefit + Hallmark A

- Confidentiality required for an arrangement
- Fees from intermediary linked to tax advantage
- Standardised documentation not needing substantial customisation

Conversion of income
Loss acquisition
Circular transactions

Tax benefit + Hallmark B

- Acquisition of loss making company to reduce tax liability
- Conversion of income into capital or other category with lower level of tax or exempt
- Circular transactions, round tripping of funds, or similar



Cross-border deductions & low taxation of income

Tax benefit + Hallmark C

- Deductible cross-border payments between associated enterprises where a recipient:
- is not subject to tax; taxed close to zero; benefits from an exemption to tax; or benefits from a preferential tax regime

No main benefit test required – Hallmarks C to E

Cross-border deductions & low taxation of income

Hallmark C

- Deductible cross-border payments between associated enterprises where a recipient is not tax resident anywhere, OR is an EU/OECD 'non-cooperative' jurisdiction
- Item obtains depreciation / DT relief in more than one territory
- Transfer of assets where a material difference in 'payable' between jurisdictions involved

Non-transparency in reporting or beneficial ownership

Hallmark D

- Arrangement undermines reporting requirements under automatic exchange
- Arrangements involving a non-transparent legal or beneficial ownership where:
- inadequate substance; and management or control is in a separate jurisdiction to beneficial owners; and owners made unidentifiable

Transfer Pricing

Hallmark E

- Unilateral Safe Harbours
- Transfers of 'Hard-to-Value' intangibles (IP) or rights to IP where no reliable comparable exists and future cash flows are uncertain.
- Intra-group cross-border transfer (incl. assets) resulting in EBIT of below 50% (of EBIT without the transfer) in the transferor within 3 years